No. 82-1686

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ISMENE M. KALARIS, Administrative Appeals Judge,

and

JULIUS MILLER, Administrative Appeals Judge,
Petitioners,

v.

RAYMOND J. DONOVAN, Secretary of Labor,
MALCOLM R. LOVELL, JR., Under Secretary of Labor, and
ROBERT L. RAMSEY, Chief Administrative Appeals Judge,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

This is Petitioners' reply to the Brief For The Respondents In Opposition to our petition for a writ of certiorari to review a judgment of the United States Court of Appeals for the District of Columbia Circuit upholding the power of the Secretary of Labor to remove, without cause, the judicial officers who compose the Benefits Review Board established by 33 U.S.C. § 921(b).[1]

We note first that the Secretary has generally failed to address the only question that is relevant at this stage:

[1] Our Petition is cited in this Reply Brief "Pet. ———"; Respondents' Brief in Opposition is cited "Resp. Bf. ——."

namely, whether the issues in this case deserve full review by this Court. *See* Sup. Ct. R. 17.1. Thus, the Secretary does not dispute our point (Pet. 7-10) that a decision by this Court in this case is necessary to help dispel the confusion that now exists below regarding the nature of the Board and its relationship to the Secretary. Instead, the Secretary simply argues the merits of his position. We respond briefly to those arguments in the balance of this brief.

1. The Secretary has misstated the principal question presented and the law that controls its disposition. The Secretary states the issue as being whether "members of the Benefits Review Board . . . may be removed by the Secretary." Resp. Bf. (i).[2] He next seeks to tag us with arguing that Congress created "life tenure in an office [that] is virtually unknown in the federal government" and meant to "insulate [the Board] . . . *totally* from the Secretary . . . ." *Id.* at 5, 9 (emphasis added).

Neither the statutory question we present nor our position on it is so broad.[3] This case involves a dismissal of the Board's judicial officers *without cause*. *See* Pet. (i) (Question 1), 5, 19 n.34.[4] We have shown that the

[2] Although he attaches no legal significance to the point, the Secretary notes that he proposes to transfer petitioners to positions of like grade and salary within the Department. Resp. Bf. 3. The record shows that this offer was not made until after this litigation began. Aff. of Ismene M. Kllaris ¶ 3, attached to Plaintiffs' Opposition to Motion for Immediate Issuance of Mandate, Jan. 24, 1983, D.C. Cir. Nos. 82-1631, etc.

[3] The Secretary understands that our principal contention rests on the Longshoremen's and Harbor Workers' Compensation Act (the "LHWCA"). Resp. Bf. 5. If the Court accepts our view of the LHWCA, we see no reason why, in this case, it need reach our separate Article III contention. Pet. 25-28.

[4] The Secretary has never contended that there is cause for Petitioners' removal. Nor did he promulgate regulations that would define tenure of Board members in some way that preserved the Board's independence.

Secretary's claim to such sweeping power cannot be squared with Congress' intent—and, we think, obligation —to constitute this Board as an independent adjudicative body. Pet. 11-25. But we emphasized that "it is *not* our position that the LHWCA protects Petitioners from removal even *with* cause." *Id.* at 19 n.34 (first emphasis added). We added that our position on the LHWCA goes no farther than to deny to the Secretary a removal power, such as the one he asserts here, that destroys the Board's independence. *Id.*

We do not argue, then, that the LHWCA places the Board totally beyond the Secretary's reach, precludes him from discharging his executive responsibilities under the LHWCA, or otherwise creates for the Board's members a tenure "virtually unknown in the federal government" (Resp. Bf. 5), one "'not attached to a single other civil office in the government . . . .'" *Id.* at 5-6, *quoting Shurtleff* v. *United States*, 189 U.S. 311, 318 (1903). Contrary to the Secretary's suggestion (Resp. Bf. 9), there is nothing "extraordinary" today about the protection the LHWCA affords Petitioners. Unlike generations ago, when the cases the Secretary relies on were decided,[5] civil officers in government today enjoy numerous statutory protections against arbitrary adverse per-

[5] The Secretary relies principally on Shurtleff v. United States, 189 U.S. 311 (1903), Reagan v. United States, 182 U.S. 419 (1901), and *In re* Hennan, 38 U.S. (13 Pet.) 230 (1839), all decided before passage of the Lloyd-La Follette Act (37 Stat. 539, 555 (1912)), in which Congress for the first time broadly protected the tenure of government employees in the civil service. *See* Arnett v. Kennedy, 416 U.S. 134, 148 (1974) (opinion of Rehnquist, J.).

In this connection, the Secretary brings us to task for having "ignore[d]" that *Shurtleff* involved removal of a quasi-judicial officer. Resp. Bf. at 6 n.1. If the general appraiser in *Shurtleff* was a purely adjudicatory officer as Board members are (Pet. 14), that fact does not appear in the *Shurtleff* opinion. In any event, like *Reagan*, *Shurtleff* is in the line of cases that culminated in Myers v. United States, 272 U.S. 52 (1926), the rule of which has since been confined to purely executive officers. *See* Pet. 11-13.

sonnel actions. In particular, administrative law judges (including, of course, those whose decisions the Board reviews) may not be removed from their jobs without cause. 5 U.S.C. § 7521. Petitioners claim no greater protection under the LHWCA than that enjoyed by the adjudicative officers whose decisions Petitioners review.

2. Having tortured the decisions in *Humphrey's Executor* v. *United States*, 295 U.S. 602 (1935) and *Wiener* v. *United States*, 357 U.S. 349 (1958) beyond recognition (*see* Resp. Bf. 6-7; Pet. 11-15),[6] the Secretary makes three points concerning the LHWCA. Resp. Bf. 8-12. Our Petition dealt with those points (Pet. 16-20), and we note here only the gap between fact and fancy in the Secretary's brief. Thus, the Secretary thinks that Congress' unexplained failure to adopt one of many recommendations in a 151-page report is evidence that Congress "specifically addressed" the matter of the Board's independence. Resp. Bf. 8; *see* Pet. 16 n.29. A single regulation, not invoked before this case, is made out to be a consistent administrative practice, despite all the contrary evidence regarding the Department's respect for, and even trumpeting of, the Board's independence. Resp. Bf. 10; *see* Pet. 4 & n.5, 17-18 and Appendices E & F. Statements of a single Senator (who was not a member

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[6] *Humphrey's Executor* and *Wiener* very clearly establish that there must be an explicit statutory basis to support the Executive's power to remove the judicial officers he appoints. Pet. 12-13. "[N]o such power is given to the President directly by the Constitution, and none is impliedly conferred upon him by statute simply because Congress said nothing about it." Wiener v. United States, 357 U.S. 349, 356 (1958).

The Secretary claims that application of this holding does not turn decisively on the function of a tribunal. Resp. Bf. 7 n.2. But, *Wiener* made it unmistakably clear that the "most reliable" evidence of the nature of a tribunal is not, as the Secretary would have it, the tribunal's position on a government organization chart or provision of definite terms for its members or both. The most reliable evidence "is the nature of the *function* that Congress vested in" the tribunal. 357 U.S. at 353 (emphasis added).

of Congress nine years before when the relevant LHWCA amendments were enacted) become "a clear congressional understanding" of the import of the amendments. Resp. Bf. 11; *see* Pet. 18-19 & n.33. In none of these instances do the facts support the Secretary's conclusions.

3. The Secretary's challenge to our standing to make the separation of powers and due process points in our petition is misconceived. We are not asking this Court to declare the LHWCA unconstitutional, as the Secretary seems to think. Resp. Bf. 12; Pet. 20 n.35. Our position is only that the Secretary's construction of the LHWCA raises serious separation of powers and due process problems and should therefore be rejected (among other reasons) under the familiar rule of construction that requires courts to avoid bringing a statute into constitutional doubt. Pet. 20. As the Secretary recognizes elsewhere (Resp. Bf. 5), our claim rests on the LHWCA and the fact that that claim is also supported by the constitutional points we have made does not mean that we rest it "'on the legal rights or interests of third parties.'" Resp. Bf. 12, quoting *Warth* v. *Seldin*, 422 U.S. 490, 499 (1975).

4. The Secretary claims that the separation of powers issue in this case is controlled by *Crowell* v. *Benson*, 285 U.S. 22 (1932), because the deputy commissioners there were not Article III judges. Resp. Bf. 13-14.[7] We never said that they were. What we did say was (a) that the separation of powers doctrine prohibits assignment of part of the core judicial power to an *executive* officer and (b) that because the deputy commissioners in *Crowell* were part of an independent agency—not the Executive Branch—*Crowell* cannot be dispositive here. The Secretary has missed our point.[8]

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[7] Not once in his brief does the Secretary mention the "private rights" doctrine, much less come to grips with its importance for the Article III issues in this case. *See* Pet. 21-23.

[8] The Secretary also points out in this connection that the Courts of Appeals duplicate the Board's functions. The point is more

When the dust settles on due process, it appears that the Secretary has found one decision, *Marcello* v. *Bonds*, 349 U.S. 302, 311 (1955), involving a challenge to the fairness of an adjudication scheme on grounds similar to those here. But the due process problem here is not simply that the adjudicator has been subjected to the control of "officials . . . charged with investigative and prosecutive functions," as was true in *Marcello*. *See id.* It embraces the fact that the Secretary, through his stand-in, the Director, is present in the courtroom, vigorously advocating his views to judges who, the Secretary says, hold their jobs at his pleasure. The cases we have cited, some decided since *Marcello*, do not permit a judicial officer to be subjected to such coercion. *See* Pet. 23-25. Moreover, in *Marcello*, the Court clearly limited its holding to deportation proceedings, which were characterized by "long-standing practice" and presented "special considerations applicable to deportation which the Congress may take into account in exercising its particularly broad discretion in immigration matters." 349 U.S. at 311. No long-standing practice or special considerations exist to justify the due process nightmare that the Secretary contemplates here.

* * * *

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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theoretical than real. This Court recently found that only one out of ten cases that reach the Board are also appealed to the Courts of Appeals, and only 0.1 per cent of all injury cases are. *See* Morrison-Knudsen Constr. Co. v. Director, OWCP, 51 U.S.L.W. 4607, 4610 n.13 (May 24, 1983).